No. 3057

IN THE

United States Circuit Court of Appeal

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Plaintiff in Error.

vs.

MATILDA C. NEASHAM,

Defendant in Error.

PETITION FOR REHEARING

THOMAS E. KEPNER,
Attorney for Defendant in Error.

Filed this ..... day of 1918

FRANK D. MONCKTON, Clerk.

By ..... Deputy.

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And now comes Matilda C. Neasham, the defendant in error above-named, by Thomas E. Kepner, her Attorney, and respectfully petitions and moves the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, to grant a rehearing upon the particular point involved in the opinion of the Court filed herein on April 1, 1918,

THOMAS E. KEPNER,
Attorney for Defendant in Error.

Counsel desires to apologize to the Court for failing to ask leave at the time this case was called for argument to file a supplemental brief in answer to the so-called Reply Brief of plaintiff in error. It appears from the record that that Reply Brief was served and filed on the eve of the argument, and doubtless an answer in printed form should have been filed. Counsel now apologizes to the Court for failing to ask leave to file such answer.

An examination of the authorities, on the precise point involved, made since the argument on February 8, 1918, and re-examined since the opinion of the Court herein was filed, has served to convince counsel and, it is submitted, should satisfy the Court, that the method of impeachment adopted at the trial of this cause, was the only legal method, under the Statute of Nevada, of challenging the veracity of the witness; that, had the course of procedure urged by Plaintiff in Error in its so-called Reply Brief, and approved by the Court in the opinion referred to, been followed, it would have been a gross error, which if objected to and timely urged upon your Honors would doubtless have resulted in a reversal of the judgment. Under such circumstances, and wholly aside from the instant case, it seems to be an imperative duty resting upon counsel to present the authorities which sustain the ruling of the District Court in this Petition for Rehearing.

THE ISSUE OF LAW DEFINED.

It is not profitable to discuss conceded propositions or those not involved in this Petition. It is, therefore, conceded that the impeaching testimony was and is important. It is conceded that the impeaching testimony is not in the form of a deposition. It is conceded that it was neither read over to the witness at the inquest nor signed by him. There remains but one question, namely, the meaning and effect of the Statute of Nevada, which provides, in so many words, that "The testimony at such inquest shall be reduced to writing by the Justice of the Peace, acting as Coroner, or as he may direct, and by him, without delay, filed in the office of the Clerk of the District Court of the county." (Revised Laws of Nevada, 1912, Section 7550.)

And we urge that the impeaching testimony was taken in exact accord with the Statute; that it was reduced to writing, under direction of the Coroner, in strict accord with the mandate of the Statute; that it was filed in the proper archives and properly preserved. And that said testimony so taken, reduced to writing and filed, was and is the best evidence of what actually occurred at the inquest upon the body of William C. Neasham, Deceased.

Under all the circumstances, this petition for rehearing is presented with the confident expectation that Your Honors will approach the consider-

ation of the authorities presented with an open mind unaffected in any degree by the opinion heretofore formulated and expressed upon the subject.

In Underhill's Criminal Evidence, Section 40, page 50, it is said:

> "Oral evidence is inadmissible if the law requires primary evidence in writing, or if the party to substantiate his claims must produce a writing. Judicial records, other public records, deeds of conveyance and contracts not to be performed within a year are required by statute to be in writing. Hence the fact of another indictment pending, a prior verdict of acquital or conviction, **the proceedings and the testimony taken at a Coroner's inquest, or at the preliminary examination, or before the grand jury, or anybody keeping a record of its actions, must be shown by the records or by a properly authenticated copy.**"

In 1 Greenleaf on Evidence, 14th Edition, Section 227, the learned author says:

> "As the statutes require that the magistrate shall reduce to writing the whole examination, or so much thereof as shall be material, the law **conclusively presumes,** that if anything was taken down in writing, the magistrate performed all his duty by taking down all that was material. In such case, no parole evidence of what

the prisoner may have said on that occasion can be received. But if it is shown that the examination was not reduced to writing; or if the written examination is wholly inadmissible, by reason of irregularity; parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected."

Continuing in Section 228, Greenleaf says:

"It has already been stated, that the **signature of the prisoner is not necessary** to the admissibility of his examination, though it is usually obtained."

In the case of Woods v. State (63 Ind. 353, at page 357), the Supreme Court of Indiana, treating of this precise question, said:

"The act prescribing the powers and duties of coroners, and providing for holding inquests upon the bodies of persons supposed to have come to their death by violence or casualty, enacts, that 'all persons desirous of being heard, shall be examined as witnesses, and the coroner may cause witnesses to be summoned by subpoena issued by him * * * who shall answer all questions asked them on oath, touching such death.' Also, that 'all testimony shall be in

writing, subscribed by the witnesses,' etc. 2 R. S. 1876, p. 21, Secs. 8 and 9.

"In volume 1, Sec. 227, of Greenleaf's Evidence, it is said: 'The rule, that parol evidence cannot be given of any matter which has been reduced to writing, unless the writing cannot be introduced, is too well established to require the citation of authorities to sustain it.'

"Having in view the authorities above cited and the principles which they enunciate, we are constrained to hold that the court erred in permitting Mackedon, Schmidt and Deacon to testify as they did, as to what was sworn to before the coroner's jury."

In Robinson v. State (87 Ind., 292), it is said:

"Among the questions involved in the ruling upon the motion for a new trial we will consider but one. The others need not, or at least may not, arise upon a second trial of the case. The wife of the appellant testified in his behalf, and on cross-examination was asked, for the purpose of laying a foundation for impeachment, whether she did not, on her examination before the coroner at the inquest, make a certain statement inconsistent with her testimony. She answered in the negative; and, for the purpose of contradicting her, the coroner was called, and, over objection by the appellant that parol evidence was not admissible to show the

testimony of a witness at an inquest, that the coroner's written statement of the testimony delivered before him was the best evidence, and should be produced or its absence explained, was permitted to answer that she did make the statement imputed to her; that she made it in answer to a question put to her by Dr. Griffith just as she was leaving the witness stand; that Dr. Griffith was engaged at the time in making a **post mortem** examination of the deceased at the request of the coroner, and aided him in interrogating the witness; that he took down in writing such answers of the witness as he deemed material; that he did not take down the particular statement concerning which he had testified.

"The admission of this testimony, over the objections made to it, was erroneous. It is shown that the testimony of the witness before the coroner was reduced to writing; the presumption is that it was all, so far as material, reduced to writing, and, as the law requires, 'subscribed by the witness.' Woods v. State, 63 Ind. 353; Brown v. State, 71 Ind. 470; Whart Crim. Ev., Section 667; 1 Greenl. Ev. Section 227. These authorities declare the rule that where the proceedings before the coroner are regular, the record of the testimony taken before him will be the best evidence of what the testimony was, and parol evidence will not be received of anything not contained in the record; or, as

Wharton states it, 'the writing can not be verified by parol proof.'

"Even if it be competent to prove that statements were made at an inquest, and what they were, which were not reduced in writing, it is not competent to show by parol what the writing does not, any more than what it does, contain. The record of the proceedings must, if practicable, be produced; and if then it is found to be so irregular or imperfect as not to be admissible in evidence, other evidence may be adduced to show what testimony a witness delivered. Brown v. State, **supra.**

"It is suggested by the attorney-general, that the evidence in this instance was proper, because it was of a statement made in answer to a question by Dr. Griffith, and not on the examination of the coroner. It appears, however, that Dr. Griffith was assisting in the examination, and his interrogatories were adopted and treated by the coroner as his own. Besides, the question put to Mrs. Robinson and to the coroner and other witnesses, on the subject, called for what she had said 'upon her examination' at the inquest.

"Judgment reversed, with instructions to grant a new trial, and for that purpose the prisoner is ordered re-delivered to the Sheriff of Brown county."

United States Life Insurance Co. v. Kielgast (6 L. R. A., page 65, 22 N. E. 467, decided by the Supreme Court of Illinois, October 31, 1889), is also in point. The then Illinois Statute quoted on page 66 of the reporter as stated by the court, required the coroner to reduce to writing the testimony of each witness examined at the inquest, which testimony shall be filed by the coroner in his office and preserved. The court said:

"The foregoing are the principal sections of the Statute which relate to the inquest of the coroner; and from the nature and character of the proceeding, as it has been recognized by courts and law writers, we must determine whether a coroner's inquisition should be used as evidence in a case of this character. It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the Statute, a record of the circuit court,—a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence in a judicial proceeding tending to prove the facts found to be

true on the face of such record? We are not prepared to adopt a rule of that kind. Moreover, we believe the weight of authority to be in favor of the admission of such evidence.

"1 Starkie, Ev. 1309, seems to lay down the rule that an inquisition is admissible in evidence. He says: 'In Sergeson v. Sealy, 2 Atk. 412, Lord Hardwicke said that inquisitions of lunacy, inquisitions post mortem, and others, were always admissible, though not conclusive. In the case of Burridge v. Earl of Sussex, 2 Ld. Raym. 1292, an inquisition post mortem, setting out the tenor of a deed, was held to be evidence of the deed.'

"1 Greenleaf on Evidence, 8556, in speaking of inquisitions, says: 'These are the result of inquiries made under competent public authority to ascertain matters of public interest and concern. They are said to be analogous to proceedings **in rem**, being made on behalf of the public; and that therefore no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence between private persons seems to be that they are matters of public and general interest, and therefore within some of the exceptations of the general rule in regard to hearsay evidence. * * * The general rule in regard to those documents is that they are admissible in evidence, but they are not conclusive, except against the parties immediately con-

cerned and their privies.' See also, 2 Phil. Ev. 5th Am. Ed. 262; Taylor, Ev. 6th Ed. § 1487, where the same doctrine is announced.

"In People v. Devine, 44 Cal. 452, the question arose whether the evidence of a witness taken before the coroner could be used to contradict the evidence of the same witness subsequently given on a trial in court. In considering the question it is said: 'The testimony had been returned into court as part of certain proceedings judicial in their character, had before an officer appointed by law, and expressly charged with the duty of reducing or causing it to be reduced to writing, and returning it into court. At common law, as well as under the Statute of Edward I.; and our Statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest **super visum corporis** is in the performance of functions judicial in their character (Reg. v. White, 3 El. & El. 144; Giles v. Brown, 1 Mill. Const. Rep. (S. C.) 231; Boisliniere v. St. Louis Co., 32 Mo. 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person (Garnett v. Ferrand, 6 Bran. & C. 611). Whether his proceedings be entered upon the coroner's roll at common law and the Statute of Edward, or returned into court under our own Statute, they amount to entries concerning matters of

public interest, made under the sanction of an official oath, and in compliance, or presumed compliance, with the requirements of law. In our investigations we have not found any authority in text books or adjudicated cases which distinguishes between these and any other official proceedings taken and returned in the discharge of official duty, as to their admissibility in evidence upon the principle referred to.' See also, Faulder v. Silk, 3 Camp. 126; Sills v. Brown, 9 Car. & P. 601.

"The citation of other authorities would seem to be unnecessary. We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by the law; and when it is returned into court, and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered."

Consolidated Ice Machine Company v. Keefer (10 L. R. A. 696), is also in point:

"It is urged that the court erred in the admission of evidence. The witnesses Marion and Gaines testified at the trial that if the swivel in

the hog chain had not been defective, the truss would have supported from sixty to a hundred thousand pounds. On cross-examination, plaintiff showed by them that they testified at the coroner's inquest upon the body of Keifer, and, having identified the transcript of their testimony, as taken down by the coroner, and signed by them, they were asked if they did not state in that examination that the hog chain, if perfect, would have sustained about thirty tons, to which they answered they did not recollect. Plaintiff, in rebuttal, introduced in evidence that portion of the witnesses' testimony to which their attention had been called, which showed they did so testify. Their deposition before the coroner had been read to, and signed by, these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examination in respect of written instruments. 1 Greenl. Ev. Secs. 463-465."

From the monographic note in the case of Cox v. Royal Tribe (42 Ore. 365; 71 Pac. 73; 95 Am. St. Rep., at page 722), the following excerpts are made:

Where the testimony before the coroner's inquest must be taken down in writing, the law conclusively presumes that it was done, and un-

less proper foundation be laid for secondary evidence, parol evidence of testimony given before the coroner by such witness is admissible, even to impeach him at the trial; Woods v. State, 63 Ind. 353. So where it is allowable to prove contradictory statements by introducing his written testimony at the inquest, it is not permissible to prove by parol other contradictory statements made by the witness at the same time, but not contained in the written testimony; Moffatt v. State, 35 Tex. Cr. Rep. 257, 33 S. W. 344.

"The deposition of a witness at a coroner's inquest, as taken down by the coroner, is the best evidence of what such witness then swore: State v. Prater, 26 S. C. 198, 613, 2 S. E. 108; and parol evidence of what was sworn before such inquest and reduced to writing by the coroner, cannot be received; State v. Zellers, 7 N. J. L. 220.

"Where the proceedings before the coroner are regular, the record of the testimony taken before him is, of course, the best evidence of what such testimony was, and parol evidence of anything not therein contained is excluded; Robinson v. State, 87 Ind. 292. Where, however, the proceedings before the coroner are so irregular that the written examination is not admissible in evidence, it is competent to prove by parol what was testified to before him; Brown v. State, 71 Ind. 470."

The rule is also stated in 40 Cyc. commencing on page 2708-2710, and in the authorities cited in notes 67 and 68, as follows:

"A witness may be discredited by showing that the testimony which he has given at the present trial or hearing is inconsistent with his testimony at a former trial of the same case, with the testimony which was given by him before the grand jury which found the indictment, or at the preliminary examination, with his testimony in a different case, in supplementary proceedings, or at a coroner's inquest."

In People v. Bushton (80 Cal. 160; 22 Pac. Rep. 127), the following is found:

"It is contended that the court below erred 'in allowing purported testimony of the prosecuting witness, Hernandez, given at the coroner's inquest, to be read in the presence and hearing of the jury, and in allowing the coroner to give evidence of the purported testimony given before him by Hernandez on that occasion, and that it erred in not striking out such evidence as hearsay.' The evidence referred to was introduced for the purpose of impeaching the witness Hernandez, who had been put upon the stand by the prosecution, and testified in such a way as to prejudice the people's case, and inconsistently with the testimony given by him at the coroner's inquest. It was proper for this purpose to call

the attention of the witness to what he had testified before the coroner, and read the same in the presence of the jury, and upon his denial of said testimony, to prove that he did so testify."

In Gasquet v. Pechin (143 Cal., 515, 77 Pac. Rep. 481, at page 484), the following is found:

"The plaintiff on the trial offered to show that the deposition had been corrected by her before it was signed or filed, and that in her original testimony, before correcting it, she had added the word 'debt' to the part first quoted, so that the last clause would read thus, 'And I ought to pay whatever I can towards this debt,' and that the last clause of the latter portion of the deposition quoted originally stood thus, 'I suppose to pay what I owed if I could.' The proper foundation was offered for this testimony, but the court refused to allow it, assigning, as the reason for the ruling, that the witness was bound only by the terms of the deposition as finally corrected before signing. This ruling was erroneous, and the reason given fallacious. If her original statement was as claimed, and was inconsistent with the testimony given on the trial on a material point, it could be proven for the purposes of impeachment, regardless of the occasion upon which the original statement was made, provided, of course, that it was not privileged."

In Lanigan v. Neely (4 Cal. App. 760, 89 Pac. 441), it is held that a deposition neither read to, or

signed by the witness, and hence not admissible as a deposition, may nevertheless be used for the purpose of impeachment. The court at page 448 of the reporter said:

"The question was read from the deposition, time, place and persons present being given; but there was no objection to the form of the question or upon any other ground, except that the purported deposition was not one in fact or in law, because it had not been read to the defendant and an opportunity given him to correct it if he so desired, and that he had not subscribed his name thereto. The objection was without merit and the court's ruling thereon eminently proper. 'A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and person present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. Section 2052, Code Civ. Proc. The document upon which this cross-examination was based was offered to the defendant to read before requiring a reply. That the question propounded was clearly within the rule authorizing the impeachment of a witness is beyond doubt. The

late case of Gasquet v. Pechin, 143 Cal., 521, 77 Pac. 481, puts the question beyond all cavil. There are, however, many California cases in support of the correctness of the ruling of the lower court. People v. Lambert, 120 Cal. 176, 52 Pac. 307; People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549; People v. Gardner, 98 Cal. 132, 32 Pac. 880; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Bosquet, 116 Cal. 75, 47 Pac. 879."

It is not necessary to render a witness' answers to interrogatories admissible, to contradict his testimony at the trial, that his answers should have been read to him before he signed his name thereto, it being sufficient to prove that he was a witness who was sworn and examined by the commissioner and whose answers the commission and return purported to give.

Ecker v. McAllister, 45 Md. 290.

And although the coroner was not legally authorized to hold an inquest, the witness' statements thereat are available to discredit him.

State v. Dixon, 131 N. C. 808, 42 S. E. Rep. 944.

In Overtoom v. Chicago, etc. Railroad Company (181 Illinois, 323, 54 Northeastern Reporter, 898, at page 900, column 2), the following is found:

The testimony of Silverman was taken by the coroner, and, as the statute required it, we will presume it was written out and signed by the

witness, and filed and preserved in the office of the coroner. Rev. St. C 31, 19. **Had his deposition thus taken been produced, and Silverman's attention properly directed to it, it could have been used to contradict him. * * * That deposition was the best evidence, and the stenographer's notes were not admissible."**

In State v. Donahue (90 Southeastern Reporter, 834), the Supreme Court of West Virginia said:

"The first point of error is that the court below, proper ground being laid therefor, would not permit defendant to introduce in evidence to the jury the testimony of Everett Redman, taken before the coroner for the purpose of concontradicting him, on material facts testified to by him on the trial before the jury. * * * Redman's testimony before the coroner was offered for the purpose of contradicting him, not as evidence of the guilt or innocence of the accused. For the purposes offered **this evidence was legal and competent and should have been admitted."**

In New York, Etc. Railroad Company v. Kallam's Administrator (83 Virginia 581, 3 Southeastern Reporter, 703), the Supreme Court of Virginia used this language, found at page 707 of the reporter:

"3. The next question relates to the admissibility of certain evidence. At the trial several witnesses for the defendant were each asked,

upon cross examination, whether or not they had made certain statements, after being sworn as witnesses at the coroner's inquest, over the body of the deceased, to which they each answered in the negative. The plaintiff, at the proper time, offered in rebuttal extracts from the depositions of these witnesses taken at the coroner's inquest, which were admitted by the court, and the defendant excepted. The evidence thus admitted related to matters which were relevant to the issue, and, the proper foundation having been laid, was rightly admitted."

In State v. Ashworth (139 La. 590, 71 Southern Reporter, 860), the sixth sub-division of the syllabus prepared by the court says:

"The sworn testimony of a witness at a coroner's inquest may be read on the trial to discredit the witness."

In Vol. 2, Elliott on Evidence, Section 1372, the following is found:

"Another class of records which are admissible in evidence either as originals or by certified copy are those partaking somewhat of the character of judicial records. As defined in one case: 'They are the results of inquiries made under public authority concerning matters of public or general interest, though the affairs to which they relate may be private. They are generally the conclusions of juries, coroners,

commissioners or other officers under oath, and often, though not necessarily, based on evidence taken under oath.' **The principle upon which this class of records is admissible is that the return or report of persons appointed by law, or under the authority of law, to investigate any matter of fact under oath, not being the foundation of a judgment or judicial decree, is prima facie evidence of the matters stated even as against persons not parties to the proceeding. This principle applies to such matters as insanity inquests, coroners' verdicts, surveys, inventories and appraisements."**

It is submitted therefore that giving the Statute of Nevada (Section 7550) its ordinary meaning there is nothing there which requires the testimony of a witness at a coroner's inquest to be taken in the form of a deposition; nothing which requires that the testimony given by a witness be read over to him, much less is there anything in the statute which requires a witness to subscribe his testimony. The duty imposed upon the coroner is mandatory: **He shall reduce the testimony to writing and file it without delay!** The law "conclusively presumes" that he did his duty; and, in the instant case, that presumption was fully sustained by the production of the coroner's record from the proper archives. No question was ever made regarding the regularity of the proceedings of the coroner; on the contrary, both parties at the

trial of this action constantly used and referred to that transcript, and under those circumstances it would be an idle thing to call any witnesses to identify the record. That it was the best evidence is sustained by the authorities above cited.

Counsel again expresses regret in adding to the labors of the Court; but feels impelled by a sense of duty to the Court to make this effort to correct what is earnestly maintained to have been an error in the disposition of this case. Counsel is as anxious as the Court can be that its conclusions should be sound and free from any just criticism, and therefore respectfully urges the Court to grant a rehearing on the point involved in its opinion filed herein on April 1, 1918.

Respectfully submitted,

THOMAS E. KEPNER,
Attorney for Defendant in Error.

THIS IS TO CERTIFY: That the opinion of the undersigned, Counsel for Defendant in Error, the foregoing Petition for Rehearing is well-founded in point of law, and that it is not interposed for delay.

Reno, Nevada, April 22, 1918.

THOMAS E. KEPNER,
Attorney for Defendant in Error.